Nos. 96-330 & 96-742

In the Supreme Court of the United States

OCTOBER TERM, 1996

Supreme Court, U.S.
FILED
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OFFICIAL COMMITTEE OF TORT CLAIMANTS,
Petitioner,

v.

DOW CORNING CORPORATION, THE DOW CHEMICAL COMPANY, CORNING INCORPORATED, BAXTER INTERNATIONAL INCORPORATED, MINNESOTA MINING AND MANUFACTURING COMPANY, BRISTOL-MYERS SQUIBB COMPANY AND MEDICAL ENGINEERING CORPORATION,
Respondents.

BREAST IMPLANT TORT CLAIMANTS REPRESENTED BY O'QUINN, KERENSKY, MCANINCH & LAMINACK,
Petitioners,

v.

DOW CORNING CORPORATION, *et al.*,
Respondents.

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On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION OF RESPONDENTS BAXTER INTERNATIONAL INC. AND BAXTER HEALTHCARE CORPORATION

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November 27, 1996

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QUESTIONS PRESENTED

1. Whether the court below erred in finding "related to" subject matter jurisdiction pursuant to 28 U.S.C. § 1334(b) over tort claims pending against Baxter that were asserted jointly and severally against Baxter and a Chapter 11 Debtor, Dow Corning Corporation, in pre-bankruptcy tort actions.

2. Whether the court below erred in concluding that 28 U.S.C. § 157(b)(5) authorizes a district court in which a Chapter 11 bankruptcy case is pending to transfer civil actions "related to" the bankruptcy case, when such actions allege a single cause of action against both Baxter and Dow Corning Corporation.

PARTIES TO THE PROCEEDINGS BELOW

In addition to the parties listed by petitioners, Baxter Healthcare Corporation was a party to the proceedings below.

STATEMENT REQUIRED BY RULE 29.6

Respondent Baxter Healthcare Corporation is a wholly-owned subsidiary of respondent Baxter International Inc., which is a publicly-owned corporation. Baxter Healthcare Corporation has no non-wholly owned subsidiaries. The non-wholly owned subsidiaries of Baxter International Inc. are Baxter S.A. (Belgium); Baxter S.A. (France); Baxter Healthcare (Holdings) Ltd. (U.K.); Baxter Healthcare Limited (U.K.); Baxter World Trade S.A. (Belgium); Baxter Healthcare Pty. Ltd. (Australia); Baxter A.G. (Switzerland); and Baxter S.A. de C.V. (Mexico).

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BRIEF IN OPPOSITION OF RESPONDENTS BAXTER INTERNATIONAL INC. AND BAXTER HEALTHCARE CORPORATION

Baxter International Inc. and Baxter Healthcare Corporation (collectively, "Baxter") hereby oppose the petitions for a writ of certiorari filed by the Official Committee of Tort Claimants (the "Committee Petition") and by the breast implant tort claimants represented by O'Quinn, Kerensky, McAninch & Laminack (the "O'Quinn Petition", and, together, the "Petitions"). The merits of this case involve the application of the provisions of a discrete jurisdictional statute to the facts of a mass tort litigation in which Baxter, among others, and a Chapter 11 debtor, Dow Corning Corporation, are defendants. Given the procedural posture of the case, the questions presented are not ripe for this Court's consideration, and the Petitions should be denied on that basis alone. Even if the merits were ripe for consideration, however, the questions presented are not worthy of this Court's attention. The decision below is not at odds with any decision of any court of appeals, and is entirely consistent with this Court's recent decision in *Celotex Corp. v. Edwards*, 115 S. Ct. 1493 (1995). Accordingly, the Petitions should be denied.

OPINIONS BELOW

In addition to the opinions cited by petitioners, the opinions below include the opinion issued on July 30, 1996 by the district court, in which that court, pursuant to 28 U.S.C. § 1334(c), declined to exercise jurisdiction over the claims against Baxter and the other nondebtor co-defendents, which the Sixth Circuit had held to be "related to" the Debtor's bankruptcy. This opinion is reprinted at Resp. App. 1a-8a.

STATEMENT OF THE CASE

Petitioners load their statements of the case with "facts" that are both highly disputed and immaterial to the issues presented by the decision below. Baxter will not burden the Court with a point-by-point response, but will instead confine its statement to material facts relevant to the questions presented for the Court's consideration.

1. Breast implants containing silicone have been on the market for more than 30 years. Originally designed by plastic surgeons in cooperation with Dow Corning Corporation ("Dow Corning" or the "Debtor"), these devices were believed to be superior in their cosmetic and reconstructive uses to implants made of other substances. By most accounts, the Debtor manufactured at least one-half of the silicone gel-filled implants sold during that period. The balance were manufactured by other companies including 3M (or its affiliates), Bristol-Myers (or its affiliates), and Heyer-Schulte, the manufacturer whose products are the cause of Baxter's involvement in this dispute (collectively, the "Co-defendants").[1] The Debtor was also the source of much of the silicone gel used in implants manufactured by other companies, including more than 90 percent of the implants sold by Heyer-Schulte. Moreover, every single implant manufactured by Heyer-Schulte had at least one silicone component manufactured by the Debtor.

Because the Debtor itself manufactured massive numbers of implants and was a principal supplier of the silicone used by these other implant makers, the Debtor and its affiliates were routinely named as co-defendants in lawsuits involving implants manufactured by others. By the date of the Debtor's Chapter 11 petition, tens of thousands of suits involving silicone breast implants had been brought in the United States. The actions in which both the Debtor and Baxter are defendants number more than 5,000, involving more than 14,000 plaintiffs. In most of these actions, the Debtor and Baxter are alleged to be

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[1] Baxter has never designed, manufactured, or marketed breast implants. Baxter is a defendant in these cases only because Baxter is, as a consequence of a series of corporate acquisitions and mergers, responsible for certain liabilities of Heyer-Schulte, the entity that manufactured the implants. Accordingly, the name "Heyer-Schulte" is used where appropriate in this opposition.

joint tortfeasors and jointly and severally liable for the damages asserted.

Indeed, every plaintiff who has sued both the Debtor and Baxter on account of silicone breast implants alleges that she suffers from one or more diseases caused by silicone, and that silicone was introduced into her body by both companies in one of two ways—either the plaintiff underwent multiple implants with devices manufactured and sold by both the Debtor and Heyer-Schulte, or the plaintiff received Heyer-Schulte implants containing silicone gel (or other components) manufactured by the Debtor. Thus, each plaintiff alleges a single set of symptoms, a single chemical agent of disease, and a single cause of action involving two defendants—two defendants whose responsibility for those symptoms and that disease is, from each plaintiff's perspective, unitary. This describes the thousands of cases in which Baxter and the Debtor are co-defendants that were the subject of the motion filed by Baxter in the district court pursuant to 28 U.S.C. § 157(b)(5); similar motions were filed by 3M and Bristol Meyers (collectively, the "Co-defendant Motions").

2. The Co-defendant Motions asked the district court to exercise its jurisdiction under 28 U.S.C. § 1334(b) and to exercise its power under 28 U.S.C. § 157(b)(5) to order that the personal injury tort and wrongful death claims "be tried in the district court in which the bankruptcy case is pending, or in the district court in which the claim arose, as determined by the district court in which the bankruptcy case is pending." 28 U.S.C. § 157(b)(5). On September 12, 1995, the district court denied transfer of the claims covered by the Co-defendant Motions on the ground that it lacked subject matter jurisdiction over the tort actions. Committee Pet. App. at 57a-64a.

On appeal, the court of appeals was required to decide whether the billions of dollars in lawsuits against Baxter and the other Co-defendants, with the attendant billions of dollars in contribution claims against the Debtor by the Co-defendants, could conceivably have an effect on

the administration of the Debtor's estate. The Sixth Circuit decided that, under well-established and non-controversial legal principles, the lawsuits could have such an effect and, accordingly, held that "related to" jurisdiction under 28 U.S.C. § 1334(b) exists with respect to these personal injury claims. Committee Pet. App. at 1a-28a.

The Sixth Circuit further concluded that 28 U.S.C. § 157(b)(5) permits the district court to fix the trial venue of all breast implant cases pending against Baxter and the other Co-defendants that are "related to" the Debtor's bankruptcy proceeding. Committee Pet. App. at 23a-26a. The court of appeals then remanded the case to the district court to determine "whether the abstention exception in Section 157(b)(4) applies to claims pending against nondebtor defendants and, if not, whether the factors calling for mandatory exemption [sic] under Section 1334(c)(2) have been met." Committee Pet. App. at 28a. The district court was also directed to address the issue of discretionary abstention under 28 U.S.C. § 1334(c)(1). *Id.*

3. On July 30, 1996, the district court on remand ruled that all of the personal injury actions against all of the Co-defendants were subject to mandatory abstention under 28 U.S.C. § 1334(c)(2) and, in the alternative, exercised its discretion to abstain from hearing those actions pursuant to 28 U.S.C. § 1334(c)(1). Resp. App. at 1a-8a. Baxter and the other Co-defendants have appealed the abstention order to the Sixth Circuit, which has expedited review, notwithstanding petitioners' attempt to have such appeals dismissed. Thus, as this opposition brief is being submitted to this Court, this case is awaiting a second Sixth Circuit decision. Although a successful appeal by the Debtor or the Co-defendants could potentially make this issue ripe—although certainly not worthy of certiorari—the procedural posture of the action below makes review of these petitions premature. The district court is not currently exercising jurisdiction over any of the claims that are covered by the Co-defendant Motions,

and not a single case against the Co-defendants has been transferred to the district court.

REASONS FOR DENYING THE PETITIONS

I. CERTIORARI SHOULD BE DENIED BECAUSE THIS CASE PRESENTS NO ISSUE THAT IS RIPE FOR THIS COURT'S CONSIDERATION.

As this Court noted long ago, "[w]hile this Court decides questions of public importance, it decides them in the context of meaningful litigation." *The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 184 (1959). That context is wholly absent here. *See also Brotherhood of Locomotive Firemen & Enginemen v. Bangor & A. R.R. Co.*, 389 U.S. 327, 328 (1967) ("because the Court of Appeals remanded the case, it is not yet ripe for review by this Court"); *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); *American Construction Co. v. Jacksonville, T. & K. W. R. Co.*, 148 U.S. 372, 384 (1893).

Indeed, petitioner Tort Committee recognizes this problem, acknowledging that, at least for now, the district court's decision to abstain stands. Undaunted, however, petitioner Tort Committee argues that "the general significance of what the Sixth Circuit has held remains unimpaired" and that the "sweeping dimensions of 'related to' jurisdiction as defined by the Sixth Circuit may be counted on to serve the visible purpose of both blocking state litigation and transferring it from the court in which plaintiffs have exercised their right to proceed." Committee Pet. at 11-12.

Petitioners' invitation to the Court to issue a sweeping advisory opinion should be declined. If the Sixth Circuit were to reverse the July 30 district court order and if, upon remand, the district court were to exercise jurisdiction over the claims against Baxter and the other Co-defendants, petitioners would be free to present their argu-

ments anew in a second petition for certiorari. It is well established that this Court may reach back and decide "all of the substantial federal questions determined in the earlier stages of the litigation." *Mercer v. Theriot*, 377 U.S. 152, 153 (1964) (quoting *Reece v. Georgia*, 350 U.S. 85, 87 (1955)); *see also Scott v. United States*, 436 U.S. 128 (1978) (same); *Indianapolis v. Chase National Bank*, 314 U.S. 63 (1941) (same); *Hamilton-Brown Shoe Co.*, 240 U.S. at 257 (same). Granting the Petitions at this stage of the litigation would be a waste of this Court's limited resources.[2]

II. CERTIORARI SHOULD BE DENIED BECAUSE THE COURT BELOW CORRECTLY APPLIED SETTLED LAW IN A DECISION THAT DOES NOT CONFLICT WITH THE DECISIONS OF THIS COURT OR OF ANY OTHER COURT OF APPEALS.

Petitioner Tort Committee asserts that the opinion issued by the Sixth Circuit "represents an unprecedented expansion of bankruptcy jurisdiction." Committee Pet. at 4. It does not. As a review of the substantial precedent interpreting 28 U.S.C. § 1334(b) makes quite clear, virtually all of the courts of appeals, and this Court, have articulated the same standard for determining whether a bankruptcy court or district court has jurisdiction over a case that is "related to" a case under Chapter 11. The Sixth Circuit's opinion is neither unprecedented nor is it any jurisdictional expansion at all; in fact, the approach of the Sixth Circuit to determining whether a proceeding is "related to" a Chapter 11 case is thoroughly conservative.

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[2] The argument made in the O'Quinn Petition, that mootness should not preclude review at this juncture because the issue at bar is "capable of repetition yet evading review," O'Quinn Pet. at 2. n.2, is sorely misplaced. This Court's opinion in *Celotex* makes clear that this issue is not capable of evading review.

Only last term, in *Celotex Corp. v. Edwards*, 115 S. Ct. 1493 (1995), this Court construed Section 1334(b) subject matter jurisdiction broadly, citing with approval the numerous decisions of courts of appeals that have held that a case is "related to" a Chapter 11 case if its outcome could "conceivably have any effect on the estate being administered in bankruptcy." *Id.* at 1499 n.6 (citing *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3d Cir. 1984)). Indeed, this Court noted that in crafting Section 1334, Congress broke with narrower, past jurisdictional grants to bestow broad and comprehensive, though certainly not limitless, jurisdiction on bankruptcy courts. *Celotex*, 115 S. Ct. at 1499.

A careful reading of *Celotex* is itself sufficient to defeat petitioners' argument. In *Celotex*, this Court explicitly adopted the Third Circuit's conclusion in *Pacor* that "Congress intended to grant comprehensive jurisdiction to the bankruptcy courts so that they might deal efficiently and expeditiously with all matters connected with the bankruptcy estate," along with its rather obvious caution that " 'related to' jurisdiction cannot be limitless." *Celotex*, 115 S. Ct. at 1499 (citing *Pacor*, 743 F.2d at 994). While the Court did not explicitly endorse the "conceivable effect" test (or any other test for that matter) for "related to" jurisdiction adopted by virtually every circuit, it *did* cite with approval the leading bankruptcy treatise that was the source of the "any effect" or "conceivably have any effect" standard. *Celotex*, 115 S. Ct at 1498-99 n.5 (citing 1 *Collier on Bankruptcy* ¶ 3.01[1][c][iv] at 3-28 to 3-29 (15th ed. 1995)). And this Court did point out that the "conceivable effect" test is the law in nine of the eleven circuits that have spoken on the issue. *Id.* at 1499 n.6.[3]

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[3] As will be discussed below, this Court did not find that the circuits were split on this issue. Rather, it noted that two of the circuits (the Sixth not among them) have adopted a "slightly different test." 115 S. Ct. at 1499 n.6. Under any formulation of the test, the claims in these cases are unquestionably "related."

Moreover, the Court did not endorse the Third Circuit's somewhat restrictive application of the "conceivable effect" test in *Pacor*. In essence, the Court held that under any relevant test, the injunction in *Celotex* fell within the "related to" jurisdiction of the bankruptcy court. The same is true of the ruling here.

There is much in *Celotex* that supports the approach employed by the Sixth Circuit. In deciding not to dissolve the injunction against certain non-debtor third parties, the bankruptcy court in *Celotex* made the following findings:

> [I]f the Section 105 stay were lifted to enable the judgment creditors to reach the sureties, the sureties in turn would seek to lift the Section 105 stay to reach Debtor's collateral, with corresponding actions by Debtor to preserve its rights under the settlement agreements. Such a scenario could completely destroy any chance of resolving the prolonged insurance coverage disputes currently being adjudicated in this Court. The settlement of the insurance coverage disputes with all of Debtor's insurers may well be the linchpin of Debtor's formulation of a feasible plan. Absent the confirmation of a feasible plan, Debtor may be liquidated or cease to exist after a carrion feast by the victors in a race to the courthouse.

In re Celotex Corp., 140 B.R. 912, 915 (Bankr. M.D. Fla. 1992), *quoted in Celotex*, 115 S. Ct. at 1500. This Court's repetition of such a chain of "conceivable effects" as supporting its jurisdictional conclusion in *Celotex* is striking. And its reason for this reference was to drive home a fundamental, long-standing point about bankruptcy jurisdiction:

> In light of these findings by the Bankruptcy Court, it is relevant to note that we are dealing here with a reorganization under Chapter 11, rather than a liquidation under Chapter 7. The jurisdiction of bank-

> ruptcy courts may extend more broadly in the former case than in the latter. Cf. *Continental Illinois Nat. Bank & Trust Co. v. Chicago, R.I. & P.R. Co.*, 294 U.S. 648, 676, 79 L. Ed. 1110, 55 S. Ct. 595, 606 (1935).

Celotex, 115 S. Ct. at 1500.

The Court noted that its holding "is in accord with representative recent decisions of the Courts of Appeals." *Celotex*, 115 S. Ct. at 1500. It then listed three decisions that epitomize the practical approach to jurisdiction that the Sixth Circuit has followed for over a decade. *American Hardwoods, Inc. v. Deutsche Credit Corp. (In re American Hardwoods, Inc.)*, 885 F.2d 621, 624 (9th Cir. 1989); *MacArthur Co. v. Johns-Manville Corp. (In re Johns-Manville Corp.)*, 837 F.2d 89 (2d Cir.), *cert. denied*, 488 U.S. 868 (1988); *Oberg v. Aetna Casualty & Surety Co. (In re A.H. Robins Co.)*, 828 F.2d 1023 (4th Cir. 1987), *cert. denied*, 485 U.S. 969 (1988). Each of these cases involved the exercise of bankruptcy jurisdiction over claims between non-debtors, and each of these cases was resolved by determining whether *substantive* provisions of the Bankruptcy Code authorized or prohibited the relief sought. "Related to" jurisdiction, if discussed at all, was upheld summarily.

The decision below follows longstanding Sixth Circuit precedent. For over a decade, the Sixth Circuit has consistently held that where the facts of a case suggest that the potential for contribution claims against the debtor is real and there is therefore a genuine likelihood that tort actions could have an impact on the debtor's estate, the underlying tort actions that originally named the debtor as a co-defendant are "related to" the bankruptcy case. Moreover, the Sixth Circuit, for years, has consistently applied the holding that automatic debtor liability is not a prerequisite to "related to" jurisdiction. *See Kelley v. Nodine (In re Salem Mortgage Co.)*, 783 F.2d 626 (6th Cir. 1986) (upholding "related to" jurisdiction despite

absence of automatic debtor liability); *Robinson v. Michigan Consolidated Gas Co.*, 918 F.2d 579 (6th Cir. 1990) (same); *Michigan Employment Security Commission v. Wolverine Radio Co. (In re Wolverine Radio Co.)*, 930 F.2d 1132 (6th Cir. 1991), *cert. dismissed*, 503 U.S. 978 (1992) (same); *Sanders Confectionery Products, Inc. v. Heller Financial, Inc.*, 973 F.2d 474 (6th Cir. 1992), *cert. denied*, 506 U.S. 1079 (1993) (same); *8300 Newburgh Road Partnership v. Time Construction, Inc. (In re Time Construction, Inc.)*, 43 F.3d 1041 (6th Cir. 1995) (per curiam) (similar conclusion in dicta).

Furthermore, there simply is no circuit split on this issue. To attempt to create a split with the Sixth Circuit, petitioners allege a "direct conflict" (Committee Pet. at 9, O'Quinn Pet. at 8-10) with the Third Circuit's holding in *Pacor, Inc. v. Higgins*, 743 F.2d 984 (1984). This Court found no such split last year, when it noted in *Celotex* that eight circuits had adopted the *Pacor* "any conceivable effect" test with "little or no variation," and that two circuits "seem to have adopted a slightly different test." *Celotex*, 115 S. Ct. at 1499 n.6. Even more importantly, this Court cited the Sixth Circuit's decision in *Salem Mortgage—which applied the exact same rule of law as did the opinion below*—as one of the many circuit opinions that had followed the approved portion of *Pacor* with little or no variation.

Indeed, it is evident from opinions rendered after *Pacor*, that the Third Circuit perceives no conflict with its sister circuits and has retreated from the very narrow facet of *Pacor* upon which the Tort Committee places total reliance, *i.e.*, that a claim against a third party must "automatically" create liability against the debtor to fall within the court's "related to" jurisdiction.[4] Thus, in *In re Marcus Hook*

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[4] It is also important to note that the Sixth Circuit below, applying the approach that has pervaded its analysis and the analysis of

Development Park, Inc., 943 F.2d 261 (3d Cir. 1991), the Third Circuit held that "related to" jurisdiction existed over an action between two third parties relating to property that had once been part of the debtor's estate, even though there was no certainty that resolution of the dispute would have any impact on the debtor's estate. Construing the very statutory subsection at issue here, the Third Circuit repeatedly quoted from and relied upon decisions from the Fifth and Sixth Circuits, including *Salem*:

> A proceeding is related to bankruptcy if *"the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy," Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3d Cir. 1984) (emphasis in original). *Accord In re Fietz*, 825 F.2d 455, 457 (9th Cir. 1988); *Matter of Wood*, 825 F.2d at 93 [5th Cir. 1987]; *In re Dogpatch U.S.A., Inc.*, 810 F.2d 782, 786 (8th Cir. 1987); *In re A.H. Robins Co., Inc.*, 788 F.2d 994, 1002 n.11 (4th Cir.), *cert. denied*, 479 U.S. 876, 107 S. Ct. 251, 93 L. Ed.2d 177 (1986); *In re Salem Mortgage Co.*, 783 F.2d 626, 634 (6th Cir. 1986). A key word in this test is "conceivable." Certainty, or even likelihood, is not a requirement. *In re Wolverine Radio Co.*, 930 F.2d at 1143 [6th Cir. 1991]. Bankruptcy jurisdiction will exist so long as

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other circuit courts for over a decade, indicated that the facts before it distinguished this case from *Pacor*. The Sixth Circuit held that:

> [T]here is a qualitative difference between the single suit involved in Pacor and the overwhelming number of cases asserted against Dow Corning and the nondebtor defendants in this case. A single possible claim for indemnification or contribution simply does not represent the same kind of threat to a debtor's reorganization plan as that posed by the thousands of potential indemnification claims at issue here. Cognizant of the fact that "related to" jurisdiction cannot be limitless and concerned about granting benefits of the automatic stay in bankruptcy to solvent co-defendants, we nevertheless believe the possibility of contribution or indemnification liability in this case is far from attenuated.

Committee Pet. App. at 20-21a.

> it is possible that a proceeding may impact on "the debtor's rights, liabilities, options, or freedom of action" or the "handling and administration of the bankrupt estate." *In re Smith*, 866 F.2d 576, 580 (3d Cir. 1989). *Accord Pacor, Inc. v. Higgins*, 743 F.2d at 994.

943 F.2d at 264 (emphasis in original, bracketed notations supplied). Accordingly, even if the Third Circuit may have started out in a slightly different position as to how the "related to" standard applies, subsequent rulings of that court make clear that it views its position as in accord with the other circuits.[6] *See also Torkelsen v. Maggio (In re Guild and Gallery Plus, Inc.)*, 72 F.3d 1171, 1181 (3d Cir. 1996) (applying *Marcus Hook* holding). There

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[6] The argument of the O'Quinn Petitioners, that the opinion below splits with the Second and Eleventh Circuits, borders on frivolous. The Eleventh Circuit correctly noted that the decision in *Salem Mortgage*—in a specific holding that was directly quoted and reaffirmed in the opinion below—was among the more *conservative* opinions on the issue of "related to" jurisdiction, because it required that the connection to the estate not be overly remote. *See Miller v. Kemira (In re Lemco Gypsum, Inc.)*, 910 F.2d 784, 788 (11th Cir. 1990) (citing *Salem* approvingly and noting Sixth Circuit's conservative requirement that possibility of effect on estate not be remote). In the opinion below, the Sixth Circuit, citing *Salem*, again reaffirmed that " 'situations may arise where an extremely tenuous connection to the estate would not satisfy the jurisdictional requirement' of Section 1334(b)." Committee Pet. App. at 10a (*citing Robinson v. Michigan Consolidated Gas Co., Inc.*, 918 F.2d 579, 584 (6th Cir. 1990), *citing Salem Mortgage*, 783 F.2d at 634). Like this Court, the Sixth Circuit has repeatedly made clear that "related to" jurisdiction is not limitless.

The contention of a split with the Second Circuit is equally misguided. The O'Quinn Petition alleges a split with the Second Circuit based on one line in *In re Turner*, 724 F.2d 338 (2d Cir. 1983), in which that court noted that a "significant connection" to the estate was lacking in the case before it. In addition to the fact that this Court cited the *Turner* opinion in *Celotex* and found no split, there is simply no divergence between the *Turner* holding and that of the Sixth Circuit.

is simply no existing circuit conflict warranting this Court's review.[6]

Petitioners present no basis for disturbing the Sixth Circuit's application of well-settled precedent to the facts of this mass tort bankruptcy. The claims of the tort plaintiffs against Baxter are at least as closely "related to" the Debtor's bankruptcy as the claims of numerous entities as to whom jurisdiction was upheld in cases cited without objection by this Court in *Celotex*.

Baxter is a co-defendant with the Debtor in single causes of action that, in the aggregate, were the cause of the Debtor's resort to Chapter 11. It is a co-defendant, either because a plaintiff received multiple implants manufactured by *both* Heyer-Schulte and the Debtor, or because—if a Heyer-Schulte implant alone was at issue—every single implant ever made by Heyer-Schulte contained a silicone component manufactured by the Debtor. As a Co-defendant, Baxter has contingent, unliquidated claims for contribution and indemnity the size of which will be determined *exclusively* by the success of the plaintiffs' claims against Baxter. Moreover, as a party potentially co-liable with the Debtor, Baxter has the right to file, and intends timely to file, claims in the bankruptcy case for every claimant who asserts claims against Baxter for which

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[6] Respondents recognize that the Seventh Circuit, citing no judicial precedent but its own, has applied a slightly more restrictive inquiry. *See In re Fedpack Systems, Inc.*, 80 F.3d 207 (7th Cir. 1996). Seemingly defensive about its decision not to follow the otherwise universal "conceivable effect" standard, that circuit court noted that "[w]hile the United States Supreme Court appears to favor a broad interpretation, it has not mandated such an approach." *Id.* at 213. The Seventh Circuit's somewhat more conservative variation of the *Pacor* test scarcely constitutes a split with its sisters. In any event, that the Seventh Circuit might apply a "slightly different test" *Celotex, supra*, 115 S. Ct. at 1499 n.16, is surely no reason to grant certiorari on a centrist opinion issued by the Sixth Circuit and on facts that would readily satisfy the Seventh Circuit standard.

the Debtor may be co-liable. 11 U.S.C. § 501(b); Fed. R. Bankr. P. 3005. Indeed, Baxter has already filed over 13,000 such claims in the Debtor's bankruptcy proceedings.

Although acknowledging that billions of dollars are at stake, petitioners nevertheless maintain that it is a "flight of advocates' fancy" (Committee Pet. at 18) to assume that any of the Co-defendants would seek indemnity or contribution from the company that was both the dominant manufacturer of breast implants and the principal supplier of raw materials used by other manufacturers in the production of breast implants. If a flight of fancy is anywhere to be found, it is in this contention. Baxter fully intends timely to file all proofs of claim necessary to preserve its legal rights against the Debtor.

Indeed, the repeated assertions in the Petitions that the Co-defendants have not yet filed contribution and indemnity claims—from which the petitioners ask this Court to draw various conclusions—are of no moment. The deadline for filing such claims is January 15, 1997. As Baxter has told every court and every attorney in this case from its inception, Baxter *will* file the claims necessary to preserve its rights by that date. Furthermore, it is ironic that the same plaintiffs who filed complaints asserting joint and several liability against Baxter and the Debtor now assert that there is no conceivable connection between their cases against Baxter and their cases against the Debtor—cases severed only because of the Debtor's intervening bankruptcy filing.

III. CONTRARY TO PETITIONERS' ASSERTION, THE SIXTH CIRCUIT WAS ENTIRELY CORRECT IN ITS READING OF 28 U.S.C. § 157(b)(5).

Petitioners also argue that the court below erred in holding that 28 U.S.C. § 157(b)(5) allows a district court to fix the trial venue of breast implant cases pending against Baxter and other Co-defendants that are "related to" the Debtor's bankruptcy proceedings pursuant to Section 1334(b). The Sixth Circuit's holding, argue

petitioners, is not only a "misreading" of the statute but also a threat to "the balance struck by Congress in setting forth the powers of courts sitting in bankruptcy." Committee Pet. at 19; O'Quinn Pet. at 17. On the contrary, the holding of the Sixth Circuit is based squarely on the only logical reading of the text of the statute, is consistent with the few cases that have interpreted it, and unquestionably promotes the statute's "oft-stated goal of centralizing the administration of a bankruptcy estate." Committee Pet. App. at 26a.

Petitioners' argument is based on words not found in the statute rather than on the language of the statute itself. First, petitioners note that the word "transfer" does not appear in the text of § 157(b)(5), and from this conclude that "transfer" is not available to Baxter even if "related to" subject matter jurisdiction exists. Petitioners ignore the fact that courts have consistently found "transfer" to be the proper relief under the statute. *Murray v. Pan American World Airways, Inc. (In re Pan Am Corp.)*, 16 F.3d 513 (2d Cir. 1994); *Coker v. Pan American World Airways, Inc. (In re Pan American Corp.)*, 950 F.2d 839 (2d Cir. 1991); *A.H. Robins Co., Inc. v. Piccinin (In re A.H. Robins Co., Inc.)*, 788 F.2d 994 (4th Cir.), *cert. denied*, 479 U.S. 876 (1986); *Calumet National Bank v. Levine (In re Levine)*, 179 B.R. 117 (N.D. Ind. 1995).[7]

These courts have recognized that Congress' purpose in enacting § 157(b)(5) was "to centralize the administration of the estate and to eliminate the 'multiplicity of forums for the adjudication of parts of a bankruptcy case.'" *A.H. Robins*, 788 F.2d at 1011 (citation

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[7] Petitioners also argue that transfer pursuant to § 157(b)(5) is available only for tort claims "against the debtor", and that the Sixth Circuit erred in relying on *Robins* as authority for the transfer of non-debtor cases. Petitioners' arguments are unavailing. The words "against the debtor" similarly do not appear in the statute, and the transfer authorized in the *Robins* case (whether ultimately effected or not) covered entire actions, including claims against non-debtors as well as claims against the debtor.

omitted). Transfer is the only efficient means by which to accomplish these goals.

Recognizing the enormous implications to any Dow Corning reorganization posed by the thousands of potential contribution and indemnity claims held by the Co-defendants, the Sixth Circuit fully embraced the Fourth Circuit's reasoning in *A.H. Robins* that, especially in the context of a mass tort case, the centralization of all personal injury claims "increases the debtor's odds of developing a reasonable plan of reorganization which will 'work a rehabilitation of the debtor and at the same time assure fair and non-preferential resolution of the . . . claims.'" Committee Pet. App. at 24a, *citing A.H. Robins*, 788 F.2d at 1011. Petitioners offer no reason, compelling or otherwise, to disturb the Sixth Circuit's correct application of § 157(b)(5) to the facts of this case.

IV. THE PETITIONS PRESENT NO ISSUE OF "DOCTRINAL SIGNIFICANCE" THAT WARRANTS REVIEW BY THIS COURT.

The issue of national importance purportedly raised by petitioners is that under the rule of law applied by the Sixth Circuit here, legions of tort claims that should properly be prosecuted in state courts will now improperly be placed in the "deep freeze" of bankruptcy. A review of the statutory structure and of the subsequent events on remand in this case make clear that this alleged concern is vastly overstated. Although Section 1334(b) informs the threshold inquiry as to whether bankruptcy jurisdiction exists over particular claims, it in no way ends the inquiry as to whether bankruptcy jurisdiction will be exercised over them. Thus, after concluding that "related to" jurisdiction existed under Section 1334(b) over claims against the Co-defendants, the Sixth Circuit remanded for a determination as to whether it was appropriate under 28 U.S.C. § 1334(c) for the district court to abstain from hearing particular matters. As the Sixth Circuit noted in its opinion below, citing to its holding in *Salem*:

> [t]he abstention provisions of 28 U.S.C. § 1334(c) qualify Section 1334(b)'s broad grant of jurisdiction. It is for the district court to 'determine in each individual case whether hearing it would promote or impair efficient and fair adjudication of bankruptcy cases.'

Committee Pet. App. at 27a (citing *Salem, supra*).[8]

In sum, petitioners' policy concerns are as exaggerated as their legal issues are premature. Accordingly, the Court should decline to review this case.

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[8] *See also Wood v. Wood (In re Wood)*, 825 F.2d 90, 93 (5th Cir. 1987) ("the abstention provisions of the Act demonstrate the intent of Congress that concerns of comity and judicial convenience should be met, not by rigid limitations on the jurisdiction of federal courts, but by the discretionary exercise of abstention when appropriate in a particular case); *Miller v. Kemira (In re Lemco Gypsum, Inc.)*, 910 F.2d 784, 788 n.16 (11th Cir. 1990) ("[w]e agree with the Fifth Circuit's opinion in *Wood* that the abstention provisions of 28 U.S.C. § 1334(c)(1) (1988) at least partially address the comity issue and obviate the need for an overly restrictive interpretation of the jurisdictional grant of § 1334(b)").

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted,

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November 27, 1996

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APPENDIX

APPENDIX

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 95-CV-72397-DT
HON. DENISE PAGE HOOD

IN RE: DOW CORNING CORPORATION,
Debtor.

MEMORANDUM OPINION AND ORDER ON REMAND REGARDING SECTION 1334(C) ABSTENTION

I. INTRODUCTION:

This matter is before the Court on remand from the United States Court of Appeals for the Sixth Circuit. *In re: Dow Corning Corporation*, Nos. 95-2034/2082/2084/2106/2107, 86 F.3d 482 (6th Cir. 1996) (Amended). This Court previously entered an order finding that it did not have subject matter jurisdiction over the tort claims against the nondebtor defendants pursuant to 28 U.S.C. § 157(b)(5). The Sixth Circuit reversed this Court's determination on this issue and found that this Court had subject matter jurisdiction over the tort claims pending against the nondebtor defendants pursuant to 28 U.S.C. § 157(b)(5). The Sixth Circuit remanded this case on the issue of whether or not this Court should abstain from the tort claims against the nondebtors pursuant to 28 U.S.C. § 1334(c)(1) and/or (2).

II. ANALYSIS:

A. *Whether this Court must abstain or, alternatively, exercise its discretion to abstain pursuant to 28 U.S.C. § 1334(c).*

1. *Mandatory Abstention.*

The Sixth Circuit has concluded that this Court has "related to" jurisdiction pursuant to 28 U.S.C. § 1334(b) over the actions pending against the nondebtors Dow Chemical, Corning Incorporated, Minnesota Mining, Baxter, and Bristol-Myers Squibb in nonbankruptcy forums nationwide. *In re Dow Corning Corp., supra* at 494. In a section 157(b)(5) motion, an abstention analysis is required. *In re Pan American Corp.*, 950 F.2d 839, 844 (2nd Cir. 1991); *In re Dow Corning Corp., supra* at 497. The Tort Claimants' briefs and other claimants' objections and responses to the nondebtors' motions under Section 157(b)(5) requested this Court to abstain under 28 U.S.C. § 1334(c).

Section 1334(c) qualifies Section 1334(b)'s broad grant of jurisdiction. *In re Dow Corning Corp.* at 497. There are two types of abstention under Section 1334(c): discretionary abstention under 28 U.S.C. § 1334(c)(1) and mandatory abstention under 28 U.S.C. § 1334(c)(2). *Id.* Mandatory abstention will be addressed first.

In order for mandatory abstention to apply, a proceeding must: 1) be based on a state law claim or cause of action; 2) lack a federal jurisdictional basis absent the bankruptcy; 3) be commenced in a state forum of appropriate jurisdiction; 4) be capable of timely adjudication; and 5) be a non-core proceeding. *Id.*

As to the first factor, the claims and causes of action at issue against the nondebtors are personal injury tort claims which are essentially state law claims. Addressing the second factor, this Court notes that the Sixth Circuit held that this Court has "related to" bankruptcy jurisdic-

tion over the nondebtors. The personal injury tort actions against the nondebtors are not proceedings which need a determination under the bankruptcy laws and do not arise in a bankruptcy case. Absent the bankruptcy of the debtor in this matter, this Court would lack federal jurisdiction over the actions against the nondebtors.[1] With respect to the third factor, there have been no allegations that the actions against the nondebtors have not been commenced in a state forum of appropriate jurisdiction. Satisfying the fourth factor, the parties have informed the Court that there are numerous cases ready for trial against the nondebtors. Furthermore, the Honorable Sam C. Pointer, Jr. in his March 19, 1996 (Order 29) and April 16, 1996 (Order 29B) orders and the Multidistrict Litigation Panel's April 10, 1996 Conditional Remand Order, indicate there are numerous cases against the nondebtors which are indeed ready for trial.

Considering the fifth factor, the Court must determine whether the actions against the nondebtors are non-core proceedings. There are two categories of core proceedings: proceedings "arising under" title 11 and proceedings "arising in" title 11. *In re Harris Pine Mills*, 44 F.3d 1431, 1435 (9th Cir. 1995), *cert. denied*, 115 S.Ct. 2555 (1995). Proceedings "arising under" title 11 "involve a cause of action created or determined by a statutory provision of title 11." *Id.* Proceedings "arising in" title 11 are a reference to those "administrative" matters that

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[1] The only cases against the nondebtors over which this Court would have jurisdiction, sitting in the Eastern District of Michigan, are those cases that involve complete diversity. The Court notes that most of the cases involving the nondebtors also include the Debtor Dow Corning Corporation which would defeat this Court's diversity jurisdiction. (*See* the Court's Discretionary Abstention analysis, *infra*.) The Court notes that mandatory abstention also apply to removed cases. *William v. Shell Oil Co.*, 169 B.R. 684, 690-691 (S.D. Cal. 1994). The Court further notes that absent the bankruptcy, the Court has no jurisdiction over the cases against the nondebtors where the claims arose outside of the Eastern District of Michigan.

arise only in bankruptcy cases and are not based on any right expressly created by title 11, but nevertheless, would have no existence outside of the bankruptcy. *Id.* Section 157(b)(2) provides a nonexclusive list of proceedings which are core proceedings. Non-core proceedings are only "related to" a case under title 11. *Id.* at 1435. A non-core proceeding "does not invoke a substantive right created by the federal bankruptcy law and is one that could exist outside of bankruptcy." *Id.*

Personal injury tort or wrongful death claims are excluded from the catalog of core proceedings by 28 U.S.C. § 157(b)(2)(B) and (O) which state in pertinent part:

> (b)(2) Core proceedings include, but are not limited to—
>
> * * *
>
> (B) allowance or disallowances of claims against the estate or exemptions from property of the estate, and estimation of claims or interests for the purposes of confirming a plan under chapter 11, 12, or 13 of title 11 *but not the liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate for purposes of distribution in a case under title 11;*
>
> (O) other proceedings affecting the liquidation of assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship, *except personal injury tort or wrongful death claims.*

28 U.S.C. § 157(b)(2)(B) and (O) (emphasis added). *In re Hughes*, 98 B.R. 115, 118 (D.C. 1988). The actions against the nondebtor defendants are non-core proceedings under 28 U.S.C. § 157.

Section 157(b)(4) provides that "[n]on-core proceedings under § 157(b)(2)(B) of title 28 [liquidation of personal injury tort or wrongful death cases], shall *not* be subject to the mandatory abstention provisions of Section 1334(c)(2)." *In re Pan Am*, 950 F.2d at 845; 28

U.S.C. § 157(b)(4). As indicated above, the non-core proceedings included in Section 157(b)(2)(B) are "liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims *against the estate* for purposes of distribution in a case under title 11." (Emphasis added). Here, the personal injury and/or wrongful death tort actions are *not* "against the estate" of the debtor but against the nondebtors. Consequently, the non-core proceedings and actions against the nondebtors are *not* exempt from mandatory abstention under Section 157(b)(4). Moreover, 28 U.S.C. § 1334(c)(2) provides for mandatory abstention in cases involving state law claims for which the sole basis of bankruptcy jurisdiction is "related to" jurisdiction. *Celotex Corp. v. Edwards*, 115 S.Ct. 1493, 1506, note 10 (1995) (Stevens, J., dissenting). In the instant case, the Sixth Circuit held that this Court had Section 1334(b) or "related to" jurisdiction over the actions pending against the nondebtors in nonbankruptcy forums nationwide. *In re Dow Corning, supra* at 494. Based on the above, the Court finds that the four factors calling for mandatory exemption under Section 1334(c)(2) have been met.

2. *Discretionary Abstention.*

Alternatively, the Court exercises its discretion to remand pursuant to 28 U.S.C. § 1334(c)(1). Section 1334(c)(1) provides:

> Nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

In *In re White Motor Credit*, 761 F.2d 270 (1985), the Sixth Circuit noted:

> . . . federal courts should be hesitant to exercise jurisdiction when state issues substantially predomi-

> nate, whether in terms of proof, of the scope of the issues raised, or of the comprehensiveness of the remedy sought.

Id. at 274 (quotations omitted). Here, the personal injury/tort claims against the nondebtors are predominantly state law claims. The proof and scope of issues in dispute and the comprehensiveness of the remedies sought varies state to state. The Sixth Circuit in *In re White Motor* further noted that:

> . . . in large bankruptcy cases with hundreds or even thousands of tort litigants beating on the door of one federal judge, . . . at least judicial economy and expeditiousness, may depend on the court's authority to refer cases to other courts. Since the 1984 Bankruptcy Act prevents reference of these tort cases to bankruptcy courts, as in the past, it makes good sense to give the district courts wide latitude in referring the cases through abstention to other courts.

Id. The Court finds that discretionary abstention from the cases against the nondebtors would best serve the interest of justice and comity. Waiting until the estimation and confirmation of a plan of reorganization before the actions against the nondebtors are liquidated would not result in a more precise estimation of the assets needed by the debtor's estate to cover any indemnification and contribution claims against the debtor's estate. The estimation of any possible indemnification and contribution claims by the nondebtors against the debtor's bankruptcy estate would not be any different than if the cases against the nondebtors proceed to trial at this stage. To the contrary, as the various trials proceed against the nondebtors, a clearer picture would emerge as to whether the nondebtors would have any indemnification or contribution claims against the debtor's estate.

The Sixth Circuit opinion addresses the Joint Insurance issue between Dow Corning, Dow Chemical and Corning

Incorporated finding that the Court had "related to" jurisdiction based on the Joint Insurance between the parties. The Sixth Circuit opinion does not address the Joint Insurance issue as it pertains to the abstention issue. This Court addresses this issue as it relates to the interest of justice and comity issues which must be addressed in an analysis of discretionary abstention. Although Dow Chemical has apparently notified insurers that it is asserting claims against the jointly-held policies, it has been argued that as to Dow Chemical, the joint policies are in fact excess policies and that Dow Chemical has sufficient primary insurance. (Ex. A, p. 5, Official Committee of Tort Claimants' Brief, filed June 7, 1996). The Sixth Circuit's opinion addresses the insurance issue from the point of view of whether the Debtor's estate will have sufficient resources. The Debtor itself has not put forth proof that its estate would be dissipated based upon the "threat" posed to those insurance policies by Dow Chemical and Corning Incorporated. In *The Matter of Zale Corp.*, 62 F.3d 746 (5th Cir. 1995), the Fifth Circuit found that even if the bankruptcy court had "related to" jurisdiction over certain insurance policies with indemnification contracts, a nondebtor should not be shielded by the powers of the bankruptcy court. *Id.* at 760-761. The Bankruptcy Code discharges the Debtor's liabilities and not those owed by third parties. *Id.* at 760, notes 42, 43, and 44; 11 U.S.C. § 524(e). If the Court does not abstain from the tort claims against the nondebtors, the tort claims against the nondebtors would effectively be determined by this Court which would be contrary to 11 U.S.C. § 524(e). Section 524(e) does not allow the Bankruptcy Code to be used to discharge the debts of nondebtors. *Id.*, at 760, notes 42, 43, and 44. The Court finds that the "threat" posed to the insurance policies by the nondebtors does not overcome factors in favor of discretionary abstention. Specifically, the Court finds the interests of justice and comity weigh in favor of discretionary abstention.

III. CONCLUSION:

This Court finds that the cases against the nondebtors are subject to mandatory abstention under 28 U.S.C. § 1334(c)(2). Alternatively, the Court finds that in the interest of justice, comity and judicial economy, it will exercise its discretion to abstain from the cases against the nondebtors under 28 U.S.C. § 1334(c)(1).

Accordingly,

IT IS ORDERED that the actions against the nondebtor defendants are subject to mandatory abstention under 28 U.S.C. § 1334(c)(2); alternatively,

IT IS ORDERED that the Court will exercise its discretion to ABSTAIN from the cases against the nondebtors under 28 U.S.C. § 1334(c)(1).

DATED: Jul. 30, 1996

/s/ Denise Page Hood
DENISE PAGE HOOD
United States District Judge